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7 Otto 319
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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 223.

ASSOCIATION

JASPER K. HERBERT, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

4/8 Robb & Wickham

FILED OCTOBER 15, 1875.

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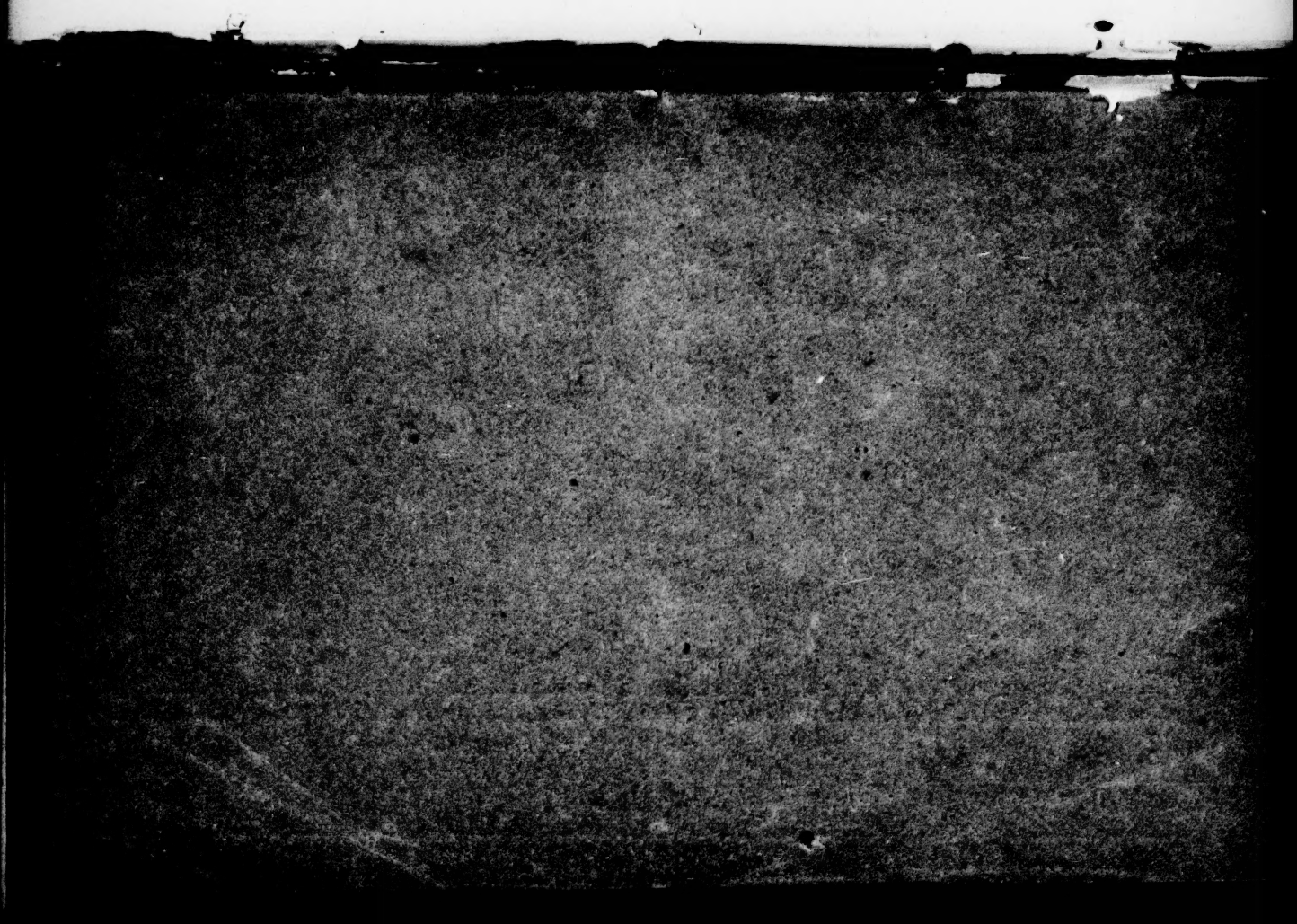

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Jasper K. Herbert and Benjamin F. Butler, a manifest error hath happened, to the great damage of the said Jasper K. Herbert, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that,

2 the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, on the 12th day of October, in the year of our Lord one thousand eight hundred and seventy-four.

B. LINCOLN BENEDICT, *Clerk.*

Allowed by—

CHA'S L. BENEDICT,
*U. S. Dist. Judge.*

3 And now here the judges of the circuit court of the United States in and for the said district make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, B. Lincoln Benedict, clerk of said circuit court, have hereunto set my hand and the seal of said court this day of October, A. D. 1875.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

4 (Endorsed:) U. S. cir't court, E. dist. of New York, 2nd circuit. Jasper K. Herbert vs. Benj. F. Butler. Writ of error. Harry Wilbur, j'r, pl'ff's att'o. Filed June 23rd, 1875.

5 UNITED STATES OF AMERICA, *ss:*

To Benjamin F. Butler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Jasper K. Herbert is plaintiff and you defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Su-

preme Court of the United States, this 22d day of June, in the year of our Lord one thousand eight hundred and seventy-five.

CHA'S L. BENEDICT.

6 The defendant in error acknowledge due, sufficient, and legal service of the above citation, by his attorneys.

June 24, '75.

DEVELIN & MILLER & TRULL,
*Att'ys for Def't in Error.*

(Indorsed:) U. S. circuit court E. D. N. Y. Jasper K. Herbert vs. Benjamin F. Butler. Citation. Harry Wilbur, j'r, pl'ff's attorney, 58 Broadway, New York City. Filed June 23d, 1875.

7 *Copy of bond.*

Know all men by these presents that we, Jasper K. Herbert and John H. Bergen, of the city of Brooklyn and State of New York, are held and firmly bound unto Benjamin F. Butler in the sum of two hundred dollars, to be paid to the said Benjamin F. Butler, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 21st day of June, 1875.

Whereas the above-named Jasper K. Herbert hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above named Jasper K. Herbert shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his
8 plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

J. K. HERBERT. [L. S.]
JOHN H. BERGEN. [L. S.]

Signed, sealed, and delivered in presence of—

WILLIAM M. IVINS.
JOHN J. CLARK, J'r.

Approved:

CHA'S L. BENEDICT,
*U. S. Dist. Judge.*

A true copy of the bond, approved by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the eastern district of New York, in the second circuit.

Attest:

B. LINCOLN BENEDICT,
*Clerk U. S. Circuit Court, E. Dist. of New York, 2nd Circuit.*

9, 10 UNITED STATES OF AMERICA,
*Eastern District of New York, ss:*

At a circuit court of the United States for the second circuit, begun and holden at Brooklyn, within and for the eastern district of New

York, on the 6th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

Before the honorable Cha's L. Benedict, district judge.

JASPER K. HERBERT, PLAINTIFF,
*vs.*
BENJAMIN F. BUTLER, DEFENDANT.

The above-named defendant appeared and filed a certified copy of summons, complaint, and order of the supreme court of the State of New York, removing the above-entitled action into this court.

And, on filing said certified copies of summons, complaint, and order, the following rule was entered:

11, 12 Circuit court of the United States of America, eastern district of New York.

JASPER K. HERBERT
*vs.*
BENJAMIN F. BUTLER

JANUARY 6TH, 1875.

On reading and filing certified copies of summons, complaint, and order of the supreme court of the State of New York removing the above-entitled action into this court, now, on motion of Develin, Miller and Trull, defendant's attorneys, it is ordered that this cause do proceed in this court as if the same had been commenced by original process therein.

It is further ordered, on reading and filing the notice of appearance of said attorneys for said defendant, that their appearance be, and the same is hereby, entered.

And thereupon, to wit, February 12th, 1875, the following declaration was filed, namely:

13 *Declaration.*

Circuit court of the United States for the eastern district of New York, in the second circuit.

JASPER K. HERBERT
*vs.*
BENJAMIN F. BUTLER.

On the 12th day of February, as yet of the February term of the circuit court of the United States for the eastern district of New York, A. D. 1875, and of the Independence of the U. S. the ninety-ninth.

EASTERN DISTRICT OF NEW YORK, *ss:*

Jasper K. Herbert, of the city of Brooklyn, in the said eastern district of New York, the plaintiff in this action, by Harry Wilber, j'r, his attorney, complains of Benjamin F. Butler, of Lowell, in the State of Massachusetts, the defendant herein, and says that this action was originally commenced in the supreme court of the State of New York, in the county of Kings, by service of a summons and complaint upon the defendant personally on or about the 21st day of October,
14 1874, pursuant to the rules and practice in said court; that said

defendant duly appeared herein, by Develin, Miller & Trull, esquires, his attorneys, and petitioned to have said action removed into this court for trial; that on the 15th day of December, 1874, an order was duly entered in said supreme court so removing said action into this court; that on the sixth day of January, 1875, copies of all the pleadings, depositions, testimony, and other proceedings in said action were duly entered and filed in the office of the clerk of this court.

That the plaintiff herein, by his attorney aforesaid, complains of the defendant herein of a plea that the said defendant render unto the said plaintiff the sum of ten thousand dollars, lawful money of the United States of America, which the said defendant to the said plaintiff owes and from him unjustly detains.

For that whereas the said defendant heretofore, to wit, on or about the 15th day of April, in the year of our Lord one thousand eight
15 hundred and seventy-four, at Washington City, in the District of Columbia, was indebted to the plaintiff in the sum of ten thousand dollars, lawful money of the United States, for so much money by the said defendant on or before that time had and received from one Gazaway B. Lamar, to and for the use of said plaintiff, and being so indebted, he, the said defendant, in consideration thereof, then and thereupon undertook and then and there faithfully promised the said plaintiff to pay him the said sum of ten thousand dollars when he, the said defendant, should afterwards be thereunto requested.

Yet the said defendant, though often requested so to do, has not paid the said sum of ten thousand dollars above demanded, nor any part thereof, to the said plaintiff, but to do this has hitherto wholly neglected and refused, and still neglects and refuses, to the damage of the said plaintiff of the sum of ten thousand dollars; wherefore he brings his suit.

HARRY WILBER, J'R,
*P'ff's Attorney*, 58 *Broadway, New York City.*

16 And thereupon, to wit, March 5th, 1875, the following defendant's plea was filed, namely:

17, 18 *Defendant's plea.*

Circuit court of the United States for the eastern district of New York, in the second circuit.

JASPER K. HERBERT }
*vs.*
BENJAMIN F. BUTLER. }

And the said Benjamin F. Butler, defendant in the above-entitled action, by Develin, Miller and Trull, his attorneys, comes and defends the wrong and injury when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this, he, the said defendant, puts himself upon the country. And the said plaintiff doth the like, &c.

DEVELIN, MILLER & TRULL,
*Att'ys for Def't*, 113 *B'way, N. Y. City.*

19, 20 Issue being thus joined, the cause after a full hearing is committed to a jury, sworn according to law to try the issue, who, after hearing all matters and things concerning the same, return their verdict therein, and upon oath say:

*Verdict.*

The jury find that the defendant is not guilty in manner and form as the plaintiff has thereof alleged in his declaration.

It is thereupon, to wit, June 1st, 1877, considered by the court that the said plaintiff take nothing by his writ, and the said Benjamin F. Butler, defendant, recover of the said Jasper K. Herbert, plaintiff, his costs of suit, taxed at thirty-two $\frac{95}{100}$.

The following case and exceptions is agreed on by the attorneys for Jasper K. Herbert, plaintiff, and Benj'n F. Butler, defendant.

21 United States circuit court for the eastern district of New York.

JASPER K. HERBERT
*vs.*
BENJAMIN F. BUTLER. } Case.

Present, honorable Charles L. Benedict, district judge.
For the plaintiff, John H. Bergen, with Harry Wilber, j'r.
For the defendant, Develin, Miller & Trull.

The issues in the above-entitled action coming on to be tried, the following-named gentlemen were duly empannelled as a jury therein:

George C Gibson, William Jeremiah, Nathaniel P. Boynton, Alva Oatman, James W. Elwell, Rowland S. Wickett, James E. Duff, J. H. Stoffergan, Cornelius L. Johnson, Noah Loder, Bernard McCaffray, & James Lott.

The plaintiff's case was opened to the jury by M'r Bergen.

22 Jasper K. Herbert was then called as a witness in his own behalf, and, being duly sworn and examined by M'r Bergen, testified as follows:

I am plaintiff in this action; am acquainted with the defendant; have known him since 1861. I employed him in 1873, to assist me in relation to a case for Gazaway B. Lamar. The employment was to assist me in procuring the dismissal of an appeal to the Supreme Court of the United States from a judgment obtained by M'r Lamar against the United States in the Court of Claims, for over $579,000. Lamar agreed to give me $20,000, and I employed Butler.

The first thing I said to General Butler when I went to Washington, after my re ainer, was, that M'r Lamar had come to me to get the appeal dismissed, (we had talked of it before,) and that I desired to employ him to assist me. He then said, "Go to the clerk, and enter my name as counsel for M'r Lamar, and get me a printed copy of the record; enter your own name also." He then gave me a note to the clerk, directing the entry of his name, and requesting a copy of the record. I

23 went to the clerk with the note, and ascertained that the appeal had not been docketed in the Supreme Court. I then went to the Court of Claims, and ordered a copy of the record to be made for me, and returned to General Butler and told him what I had found. He said that under Rule 9 we could have the appeal docketed and dismissed; that we would teach the Attorney-General's Office a trick.

The next morning I got a copy of the record certified from the Court of Claims, drew the necessary motion, and went again to General Butler's office and showed them to him. He had also drawn a motion. After looking over the record, he said, "What about fees?" I replied,

"You can have $5,000, or $10,000 if you like. I have an agreement with Lamar." He replied, "All right; with that understanding we will go to work;" and he took his hat and we started for the Attorney-General's Office.

At a subsequent interview I told Butler that my agreement with Lamar was for $20,000 fees, and that I would divide with him.

The next thing that occurred, as I remember, is, that I said to
24 General Butler, "I have been a member of the bar of the Supreme Court for a number of years, but have never had occasion to appear there; that I thought I was able for that motion, and that he had better let me make it." He replied, "No; you keep your hands off of it;" and when we went to court he made the motion. It was to docket and dismiss under Rule 9 of the Supreme Court. The motion was granted.

The next I heard from Butler about the case was on Saturday, the next day, that the Attorney-General had served him with a notice of motion to restore the cause to the docket, and that motion stood for argument on the next regular motion-day.

Next I saw General Butler in New York, and notified him that the motion would be argued on a certain day. The motion was argued and the cause restored.

We had divers interviews after that, and some correspondence, and finally General Butler told me that if newly-discovered evidence, on which to move for a new trial, was not produced before the first
25 of April, the Attorney-General had agreed to consent to a dismissal of the appeal. It was so dismissed, as I was informed by General Butler. I did not get my fee. I made application to Lamar for it and was informed by him that he had paid it to General Butler, and that I must go to him.

I then went to Butler and told him that I had called on Lamar for my fee and that Lamar said he had paid it to him. I repeated to General Butler the conversation I had had with M'r Lamar; that Lamar had told me that when he and Butler got into the carriage to go to the Attorney-General's Office, Butler said, "Now, Lamar, what about fees?" and that Lamar replied, "I agreed to give Herbert $20,000, and I am ready to do it;" that Butler replied to Lamar, "Put $5,000 to it for the Boston case and I am content;" that Lamar had "agreed to the proposition and paid the money."

Butler told me that he did have such a conversation with Lamar, but claimed the whole $20,000, on the appeal case, as his own. He said he had not one cent for me. That was in April, 1874. I do not know
26 the exact date. I wrote General Butler a letter about this matter in April, 1874.

(Plaintiff's counsel here called upon defendant's counsel to produce letter of plaintiff to defendant, dated April 9, 1874, which was not produced, no previous notice to produce the same having been given.

Plaintiff then offered in evidence a press-copy of said letter.

Objected to; excluded; plaintiff excepted. Check of G. B. Lamar, drawn on Soutter & Co. to the order of "Hon. B. F. Butler," and dated New York, April 16, 1874, offered in evidence; admitted, read in evidence, and marked "Plaintiff's Exhibit A."

General Butler's receipt to M'r Lamar for $25,000 offered in evidence; admitted, read, and marked "Plaintiff's Ex. B."

Defendant's counsel admitted the signature of the defendant on each to be genuine.)

I have talked with the defendant several times since the dismissal of the appeal about the case. At the last interview with General Butler, at Washington, I repeated the conversation between Lamar and myself, as I did from the witness-stand here, and he admitted it to be correctly reported by Lamar, and said he had received the money.

No cross-examination.

Plaintiff rests.

Defendant waived an opening, and, to maintain his defence, Benjamin F. Butler was called as a witness on his own behalf, sworn, examined by John E. Develin, esq., his counsel, and testified as follows:

I am the defendant in this action. I know the plaintiff. About the 20th of October, 1873, I received a telegram from M'r Herbert, asking if he could meet me in Washington. He came on and said that he had been employed by M'r Lamar to procure the dismissal of an appeal from the Court of Claims, where M'r Lamar had a judgment for about $579,000. He further stated that he desired to employ me to assist him. He had spoken of this matter once before in Boston. He desired to employ me, and I said I saw no objection. I said you had better get a copy of the record. He said, "How?" I said, "I will give
28 you a note to the clerk, and a receipt for a copy of the record." I also told him to enter my name and his own as of counsel for Lamar. He took the note and receipt, and came back and said that the appeal had not been entered. I said that that could hardly be possible. I then said, "Get a copy of the Court of Claims record." He did so. On examination of the dates I said, "This appeal ought to be dismissed. I will give notice of motion to the Attorney-General for Friday." I went to the Attorney-General's Office, and Herbert with me. On the way I said, "To whom shall I look for fees?" He said, "I have an understanding with Lamar to have the appeal dismissed." I said, "All right."

I made a motion to docket and dismiss, which was granted. A day or two after that the Attorney-General served me with a notice of motion to reinstate the cause, to be argued the next motion-day. I prepared an argument for the next motion-day, and argued the cause. The court reinstated the cause, and revoked the order of dismissal.

About the 1st of November, M'r Lamar came personally to
29 Washington to see me about the cause, and I told him the condition of it. M'r Lamar said he wished I would meet the motion for a new trial, on the ground of newly-discovered evidence; and he desired me to meet it in the Attorney-General's Office. I told him I would undertake to do that. I conferred with the Attorney-General, and learned what the newly-discovered evidence was. Thereupon I received notice from my client that a proposition had been made to him that by payment of $25,000 to some party or another the appeal would be dismissed.

I went to the Attorney-General and informed him of this offer, and how the dates corresponded with the offers of newly-discovered testimony, and asked him to wait ten days. He did wait ten days, but no new testimony came. Another offer was made through some one to have it dismissed for $15,000, through the Attorney-General's Office. M'r Lamar came on and advised with me. He did not take the offer, by my advice. Still another offer was made for $15,000, which he accepted against my advice, but it came to nothing.

M'r Lamar, M'r Herbert, and myself afterward met at the Fifth
30 Avenue Hotel, in New York City, and I told Lamar that if those

bargains were going on I would have nothing to do with the case. I said, "If I can't be captain, I won't sail" He assented to the proposition.

I afterwards saw the Attorney-General, and advised him to send to Savannah and hunt up the evidence. He gave notice to the parties that within 20 days the evidence must be produced or he would dismiss the appeal. No evidence came. I satisfied the Attorney-General that the judgment of the Court of Claims, as it stood upon the record, could not be reversed. He became satisfied that there was no new evidence, and dismissed the appeal.

Meanwhile M'r Lamar came to Washington. In the summer previous I tried a case for M'r Lamar, as senior counsel, with M'r Herbert, lasting over a week, and involving $670,000, in the United States circuit court in Boston. It went off on a question of law. I prepared a bill of exceptions, &c. That case is still pending in the Supreme Court.

A man claiming to be a former partner of M'r Lamar filed a bill
31 in equity in the supreme court of the District of Columbia, and procured a restraining order to prevent M'r Lamar from getting his money under the judgment in the Court of Claims. That was argued for two days. I argued for Lamar. He succeeded in having the restraining order set aside, and the warrants were obtained and sent to Lamar. M'r Lamar had had taken from him during the war the yacht Wanderer. It had been paid for, but some partners of his were trying to get one-half of it, and I was retained by M'r Lamar in that matter. About this time M'r Herbert wrote me about his fees.

(Letter of Herbert to Butler, of April 9th, 1874, put in evidence, read, and marked "Defendant's Ex., No. 1."

(Letter of Butler to Herbert of April 12th, 1874, being a reply to the last ex., put in evidence, read, and marked "Defendant's Ex. 2.")

Afterward M'r Lamar was in Washington, and I saw him on the matter of fees. He asked me what my fees would be. I asked him what
he thought they ought to be. I showed him Herbert's letter, Ex.
32 No. 1, but am not certain that I showed him my reply. Ex. No. 2. M'r Lamar said I ought to have for the Boston case and the appeal case $20,000. I suggested $25,000 for all these, including the Wanderer, estimating this case at $10,000. He said if I would see the Wanderer case through he would pay it, but he was an old man, and he wanted a receipt in full. I told him to go home and send me a check, and I would send him a satisfactory receipt. He did so, and I sent him a receipt, "Plaintiff's Ex. B." M'r Lamar had a reason why the receipt was given in this way.

(Plaintiff objects to the reason being given; excluded.)

I was next summoned to give a deposition in a suit wherein M'r Herbert had sued M'r Lamar for these fees.

(Deposition shown to witness by plaintiff's counsel, and admitted by witness to be the original and signed and sworn to by him.

Deposition offered in evidence for the purpose of contradicting the witness, as containing a history of the transaction incompatible with his testimony as given in this case.

33 Defendant's counsel objects, as out of order; excluded.
Plaintiff's counsel excepts.)

Witness, resuming:

I distinctly refused, both to M'r Herbert and M'r Lamar, to collect the claim for fees. I cannot state what occurred at the interview at Washington in regard to the payment of my fees, because it did not take place. I told M'r Herbert I had no money for him. M'r Herbert

did nothing in court in Washington after the first dismissal of the appeal, and neither did nor said anything after the interview at the 5th Avenue Hotel. I never received anything from M'r Lamar for M'r Herbert.

Cross-examination by M'r Bergen:

I did not, I think, call on M'r Herbert for any service subsequent to the reinstatement. I was in the Supreme Court only twice upon it; and in the supreme court of the District of Columbia two working days.

(Letter of Butler to Herbert, dated Washington, November 30th, 1873, offered in evidence. Admitted, read, and marked "P'l'ff's Ex. C.")

Witness, resuming:

34 I have no claim against M'r Herbert, except as that deposition shows.

Redirect examination by M'r Develin:

(Plaintiff, at the request of defendant's counsel, produces the original summons and amended complaint in the case of Herbert vs. Lamar.

Offered in evidence; objected to by plaintiffs' counsel as immaterial and irrelevant; admitted; pl'ff excepts.

Summons and complaint read in evidence, and marked "Defendant's Ex's Nos. 3 and 3.")

Defendant rests.

Mr. Herbert, recalled, testified further in his own behalf, as follows:

I have heard the testimony of General Butler, wherein he stated that no such conversation as I had repeated in relation to the settlement with Lamar had occurred between him and me at Washington. I repeat that the conversation did occur between us substantially as I have related it from the witness-stand.

M'r Lamar is dead. I did not see his corpse, but I believe him to be dead. My suit against Lamar was discontinued after the com-

35 mencement of this suit, and after the death of M'r Lamar.

(Plaintiff offers to read the cross examination of General Butler, as the same appears in the deposition taken in the case of Herbert vs. Lamar, as contradictory of the testimony given on this trial. Defendants' counsel objects unless the plaintiff points out the portions which he relies on as contradictory, and asks defendant if he so swore; objection sustained; plaintiff excepts.)

General Butler, recalled for cross-examination, says:

What I stated in that deposition is correct.

The cross-examination in the deposition was read to the witness, and when asked if he made those answers said severally, to each interrogatory: "I think I did."

The deposition is inserted at length, the portions included in brackets to be "Plaintiff's Ex., D."

Testimony closed.

The court here adjourned to the following morning, June 1st, the cause to be then summed up and submitted to the jury.

36 TUESDAY MORNING, *June 1st*, 1875.

Upon the opening of the court M'r Develin, on the part of defendant, moved the court to direct the jury to find a verdict for the defendant.

After hearing M'r Develin for the motion, and M'r Bergen opposed, the court directed the jury to find a verdict for the defendant.

To this direction by the court the plaintiff excepted.

The jury then, under directions of the court, found a verdict for the defendant.

*Plaintiff's Exhibit A.*

Number 140.]

NEW YORK, *April 16th*, 1874.

Mess'rs Soutter & Company, bankers, pay to the order of Hon. B. F. Butler twenty-five thousand dollars.

$25,000.00.

G. B. LAMAR.

*Plaintiff's Exhibit B.*

Received, Washington, April 17th, 1874, of Gazaway B. Lamar, twenty-five thousand dollars, ($25,000.00,) in full for retainer and services as counsel in the trial of his case against Albert G. Brown and others,
37 in the circuit court of the United States for the first circuit, at Boston, and also in the preparations of the bill of exceptions and entry of the same in the Supreme Court of the United States, and also for retainer and argument of motion to dismiss the case in the Supreme Court of the United States, appellant, against him, from the judgment of the Court of Claims, and services in preparing a motion for dismissing the appeal, this being in full of all services and demands due by said Lamar up to and including the date which said appeal was dismissed.

BENJ. F. BUTLER.

*Plaintiff's Exhibit C.*

WASHINGTON, *Nov.* 30, 1873.

DEAR SIR: Send M'r Lamar to me at once. His presence only is desired.

Yours, truly,

BENJ. F. BUTLER.

J. K. HERBERT,
58 *Broadway, New York.*

*Plaintiff's Exhibit D.*

New York supreme court.

COUNTY OF KINGS:

38 JASPER K. HERBERT
*ag't*
GAZAWAY B. LAMAR.

It is hereby stipulated that Benjamin F. Butler, who is about to depart from the State of New York, may be examined, conditionally, as a witness on the part of the defendant in the above-entitled action, at the Fifth Avenue Hotel, in the city of New York, this day at two o'clock p. m., and the deposition of said witness, then and there to be taken and sworn to before a notary public, may be read in evidence upon any trial or proceeding in the above-entitled action with

like effect, upon the same condition, and subject to the same objections and exceptions as if regularly taken under a judge's order, and that said deposition may remain in the possession of the attorneys for the defendant without filing, the filing thereof being expressly waived, the plaintiff's attorneys to be furnished with a copy thereof.

New York, 24th day July, 1874.

HARRY WILBER, J'R, *Pl'ff's Att'y.*
WARD, & JONES & WHITEHEAD,
*Att'ys for Def't.*

New York supreme court.

JASPER K. HERBERT, PL'FF,
*ag'st*
GAZAWAY B. LAMAR, DEF'T.

Deposition of BENJAMIN F. BUTLER, a witness on behalf of the defendant in the above-entitled action, taken conditionally, pursuant to the annexed stipulations, at the Fifth Avenue Hotel, in the city of New York, the 24th day of July, A. D. 1874.

CITY AND COUNTY OF NEW YORK, *ss:*

The said Benjamin F. Butler, being duly sworn and examined by M'r Ward, deposes and answers as follows:

Q. What is your profession?

A. Lawyer.

Q. Do you know the parties plaintiff and defendant in this case?

A. Both.

Q. Have you any knowledge of a contract between p't'ff and def't, in relation to services to be rendered by p't'ff to def't, with respect to a certain judgment recovered by the def't in the Court of Claims?

A. I have none except what comes from the declarations of the parties to me, made separately by the parties, and in one case what was said in my presence by the parties to each other.

(Counsel for plaintiff objects to any statements of what took place, except when both parties were present.)

Q. State what took place when both parties were present, and what you learned either from the p't'ff or the def't about this contract when both parties were present.

A. I cannot say that any express contract was spoken of when both parties were present, yet it was said by the p't'ff to the def't that he was engaged about his business, and the defendant assented to the fact, and the conversation, the words of which I do not remember, in substance showed that services were being performed by the p't'ff with the knowledge of the def't, and in so far was evidence of a contract express or implied.

Q. Was there anything said at that time as to the terms upon which these services were being performed?

A. Nothing between the parties.

Q. When did this interview take place?

A. Some time in the summer or early in the fall of 1873, and the last time in the late fall or winter of 1873 or '74.

Q. At which of these interviews, in the summer of '73 or the winter of 1873–'74, did the conversation to which you have alluded take place?

A. At both the conversations were in regard to services, but not at both in regard to services about this judgment. The conversation was about the judgment only in the latter.

Q. Can you be more particular in specifying the month of the year at which this last conversation took place?

A. I cannot fix it by the month; I can by an event. It was shortly after the determination by the Supreme Court of the United States of a motion to dismiss the appeal of the United States from this judgment—somewhere in the latter part of October or in the month of November, 1873.

Q. Have you any knowledge, derived from anything the parties said in presence of each other, which will enable you to state upon what terms and on what conditions the services were being rendered by p't'ff to def't?

A. I have no knowledge from anything said by the parties in presence of each other. I have heard from each party a separate statement on that subject?

Q. Did those statements agree or did they vary?

(Objected to by p't'ff's counsel. Taken subject to objection.)

42 A. They differed most materially, almost diametrically.

Q. After this conversation in October or November, 1873, of which you have spoken, did you ever have any conversation with these parties, p't'ff and def't, or with either of them, in relation to the services to be rendered in procuring the money for plaintiff (defendant) under this judgment in the Court of Claims, when both p't'ff and def't were present?

A. I had, when both parties were present.

Q. State what that conversation was.

A. I met the parties in the winter following that November at this hotel. I stated to M'r Lamar, M'r Herbert being present, that I found great difficulty in attaining any result in his case, in getting the matter closed up, because there were a number of men claiming to represent him, and to be authorized by him, meddling with the case, offering to pay money to have the appeal dismissed, and claiming that it would be dismissed if certain sums were paid, and acting so about it that the law officers of the Government felt that they could hardly act in the matter while such imputations, that money could, would, or

43 should be paid, were being made, and that one of the two things must happen—either he must assure me that under no circumstances would any one else be allowed to interfere in the case, and, above all, authorized to pay any money, or else I would quit the cause, and have nothing more to do with it. I remember the phrase I used, "I would either be captain in the case or go out of it." M'r Lamar assured me at that time that I should henceforward be sole counsel in the cause, and I continued in the case until it was brought to a close.

Q. Upon those conditions?

A. Upon his assurance, and, so far as I know, upon the full performance of his assurance, that those conditions would be performed.

Q. Was the matter brought to a successful termination; and, if so, when?

A. About the first week of April the appeal was dismissed by the action of the law-officers of the Government, the judgment affirmed, and the money obtained.

Q. By whose professional services in behalf of M'r Lamar, the def't in this case, was this appeal dismissed and payment of this judgment obtained?

(Plaintiff objects. Taken subject to objection.).

44 A. I will state precisely what was done. In October M'r Herbert came to me to aid him in filing and arguing a motion in the Supreme Court to dismiss the appeal. That motion was prepared by us together, filed, and argued. The appeal was dismissed, but reinstated upon the application of the Attorney General, on the ground that the cause of the dismissal of the appeal was simply a mispris'on or mistake in his office, and that the court should allow the appeal to be reinstated. After that I argued the matter before the Attorney General, upon the question whether there was, in his judgment, any ground upon which the appeal should be sustained, and endeavored to show him that the judgment of the Court of Claims showed no question upon which the appeal could be sustained.

The Attorney-General afterwards informed me that he had fully come to the conclusion that the record of the Court of Claims showed no question upon which the appeal could be sustained in the Supreme Court, but he called my attention to certain affidavits of newly-discovered evidence, and to the question as to his duty to move for a new trial

45 on the strength of those affidavits.

I said to him, in answer, that when the witnesses, whose names were disclosed in the affidavits, found to be respectable men, would themselves make adidavits of the facts they were supposed to know, it might be time to move for a new trial on that ground, but that he ought to ascertain from the witnesses that they would so testify before he put M'r Lamar to that expense, and I urged him to send to Savannah for that purpose, assuring him that he would never find any such witnesses; that these affidavits were made because there were men pretending to be authorized by M'r Lamar to pay money to get the appeal dismissed, and that the whole matter was an old trick of claim agents, who put in an affidavit and stop the action of the Government in the matter of the payment, then go to the party, stating that the matter has been stopped, and obtain an agreement for the payment of money. When they have obtained this agreement, they then withdraw their affidavits, or fail to make it good, and then the case goes on, and the agent claims that the judgment was got through his action.

46 The Attorney-General sent to Savannah, made the most diligent search, failed to find the witnesses, and, after three months' delay and search for the witnesses in Savannah on my part as well, and it being made certain that there was no such testimony in existence, the appeal was dismissed and the warrant drawn for the amount of the judgment in Lamar's favor.

But a former partner of his brought a bill in equity, and obtained a restraining order from the court to restrain the payment of the money to Lamar, claiming it to be his; and after an argument for a day in the supreme court of the District between Judge Barclay and Casey, late chief justice of the Court of Claims, for the complainant, and myself for M'r Lamar, that case was dismissed, the money obtained and forwarded to M'r Lamar.

Q. Where were all these services of which you have spoken, beginning with your argument before the Attorney-General for dismissal of the appeal, rendered?

A. In Washington.

Q. Were they rendered before or after the interview of which you have last spoken, at the Fifth Avenue Hotel, beginning with your

47 argument before the Attorney-General for the dismi sal of the appeal?

A. There had been conversations with the Attorney-General about dismissing the appeal, because he had no case on the merits before the last interview at the Fifth Avenue Hotel but the formal argument, and all the rest of the services were done afterwards.

Q. Were you in any manner in the rendition of these services, beginning with your argument before the Attorney General, aided or assisted by the plaintiff in this case?

A, M'r Herbert was not in Washington upon this business during that time, to my knowledge.

Q. In the rendition of the services of which you have spoken, beginning with the formal argument before the Attorney-General, was the plaintiff associated with you as the counsel for the defendant?

A. Not intending that my answer shall prejudice the question as to the relation of the plaintiff to the case, I answer that I had no occasion to call, and did not call, upon him for any assistance, and he rendered none.

Cross-examination by plaintiff:

48 Q. Who first employed you in the matter of this appeal?

A. M'r Herbert, the plaintiff, on behalf of M'r Lamar.

Q. When and where was that?

A. Some conversation was had during the trial of a case in Boston, but resulted in nothing then. The employment was some time in the month of October, 1873.

Q. Were you in Washington about the 25th of October, 1873?

A. I was there about a week, commencing about the 15th, I should say. I received a telegram from M'r Herbert, asking when I could meet him there, and I answered by telegram, substantially saying that I would meet him in Washington on one or two days named, about the 25th of October.

Q. Did you see the plaintiff there?

A. I did; he came.

Q. What was the first conversation with plaintiff?

(Objection by defendant's counsel as incompetent.)

A. M'r Herbert came to me and said in substance that he came to see about M'r Lamar's case, about which I knew something; that it was appealed from the Court of Claims to the Supreme Court; that he had

49 an arrangement with M'r Lamar to have $20,000 fee, if he could get the case dismissed, and he was willing to give me half of that fee if I would aid him. He then suggested the ground upon which he thought he could get it dismissed, that it had not been docketed in the Supreme Court regularly.

I informed him that I was at liberty to take a retainer in the Supreme Court, but not in the Court of Claims, where I was prohibited by statute. I said I would take hold of it, and directed him to go to the court and get a copy of the record, to see if the motion could be sustained on that ground, and also a certificate of the fact of non-entry in the Supreme Court, which he did. I then prepared a motion on the docket to dismiss the appeal for non-entry. This motion was prepared by both of us.

Q. Do you mean to say that at the first interview we had together in Washington in relation to this matter anything was said about fees?

A. While we were together at that time, during that visit to Washington, there was. My memory is that this conversation took place about fees at that time.

Q. Did you not give me a letter to the clerk of the Supreme

50 Court on the morning of our first interview at Washington, requesting the clerk to send you a copy of the printed record in

the case of the U. S., apellant, vs. Lamar, appellee, from the Court of Claims, and asking him to enter your name of record as of counsel on that appeal?

A. I sent by you what is required by the rules of the court, a receipt for a copy of the record, and directions to enter my name of record as counsel.

Q. Was that in two papers or one?

A. That I cannot say, but suppose it to be two—one a note to the clerk, and the other a receipt for the record.

Q. Did you give any directions about my entering my own name of record?

A. Oh, I did. I directed you to have your own name of record as well as mine.

Q. Do you know whether my name was entered of record?

A. I believe it was, and so continued down to the close of the case, and the reason was, so that the notice, if any, might be served upon M'r Herbert in New York instead of upon me in Boston. I should say, at the time of this conversation with me, M'r Herbert remained in
51 Washington one day and part of another, and if the motion was argued the next Friday, as I believe it was, he remained there until after the argument of the motion. He was present at the argument, whenever it was.

Q. Was not the appeal on the first motion dismissed?

A. It was.

Q. When was that motion made?

A. It was made on the first Friday after you came, or perhaps the second Friday. The first motion to dismiss was made on the Friday following the 25th, but the record of the court will show best.

Q. From the time of this first conversation at Washington down to the final determination of this claim of Lamar's, did you have consultations and communications with M'r Herbert?

A. From the time of the first conversation, so long as any proceedings were being taken in court, I had consultations with M'r Herbert about this case. After that I received communications from him about meeting him and M'r Lamar here about this case, in New York. From that time I had no communication with M'r Herbert about the case, except letters of inquiry from M'r Herbert, until it ended.

Q. About when did the proceedings in court end, in regard to this matter?

52 A. I should think within some fortnight or three weeks after they were commenced. By proceedings in court, I mean any movements in the Supreme Court by M'r Herbert or myself. Of course the case remained in until finally dismissed on 1st April.

Q. Now, during your negotiations with the Attorney-General was the presence of the plaintiff, M'r Herbert, necessary in Washington in order to complete the matter?

A. I did not so consider it.

Q. You at that time were residing in Washington?

A. I was after the 1st Monday of December, and occasionally there before.

Q. Did you have several conversations with Lamar about this matter when M'r Herbert was present?

A. I had two. My belief is that the first was here, at Fifth Avenue Hotel, about 1st of December, and the second was at the same place, on my way home from Washington, about 1st January.

Q. At the time of the second conversation had there been reports that this appeal could be dismissed upon payment of money?

A. I heard such.

Q. Did you experience any difficulty in managing this case on
53 account of these reports?

A. I did not in negotiating with the Attorney-General.

Q. Was there any difficulty on that account?

A. There was.

Q. And that matter was spoken of between you, M'r Lamar, and M'r Herbert at the second conversation at the Fifth Avenue Hotel?

A. I gave M'r Lamar, in presence of M'r Herbert, the statement and directions I have spoken of in my direct examination in regard to the effect of these reports in his case.

Q. Did you make this statement to M'r Lamar at the second conversation, "I must command the ship or I will not sail," or words to that effect?

A. The words as I remember are, "I must be captain in this case or I will not go on with it."

Q. Did you mean by that, general, to exclude M'r Herbert from any management of the case?

A. I meant that nobody should have anything to do with the case except through me; but I didn't mean to state that M'r Herbert was one of those persons to whom I alluded as having offered money.

54 Q. When you made that remark in your conversation had you any reference to M'r Herbert?

A. I had not M'r Herbert in my mind at that time, one way or the other, in connection with this case.

Q. Prior to this second conversation had you any employment in this case other than that through M'r Herbert, plaintiff?

A. Before this second conversation I had had a conversation with M'r Lamar personally, when M'r Herbert was not present, about the conduct of this case, here in the Fifth Avenue Hotel.

Redirect examination by M'r Ward:

Q. Did you ever have any conversation either with the plaintiff or the defendant, when they were both present, after the conversation in which you said, "I must be captain," &c.?

A. I have no recollection of any.

Q. What was the condition of the case in reference to its being on or off the docket of the U. S. Supreme Court when you had the last conversation to which you have referred?

(Objected to; taken subject.)

A. It was on the docket, standing for argument on its merits when it should be reached.

55 Q. You have said that the case was dismissed, on motion, from the docket; will you be kind enough to state how and when it was restored to the docket?

A. Immediately upon its dismissal, (which was of course in the then condition of the case,) upon the statement of the Attorney-General. He then immediately made a motion for leave to enter it anew, which was granted.

Q. Was the case in point of fact, and as a fact, so dismissed as to be out of the U. S. Supreme Court?

(Objected to; taken subject.)

A. The Supreme Court did not direct any mandate to the Court of Claims by which that court could direct any requisition upon the Treasury for the proceeds of the judgment.

(The foregoing answer was objected to, as not responsive to the question, by the plaintiff.)

Q. You have said that in your conversation with M'r Herbert he said to you that M'r Lamar would pay him $20,000 to have this appeal dismissed, and that he would divide with you to have you go into the case with him, and that to those terms you assented. Am I right in that statement?

56 A. Substantially, I believe. I gave my recollection on that subject in answer to the cross-examination.

Q. Did you demand or receive from M'r Herbert or M'r Lamar $10,000 for what occurred at the time of the dismissal in October or November?

(Objected to; taken subject.)

A. At the time of the motion in the Supreme Court, and the judgment of the court thereon, I made no such demand either from M'r Herbert or M'r Lamar.

(Objected to.)

Q. Why did you not make this demand for the $10,000?

(Objected to; taken subject.)

A. Because I understood that neither M'r Herbert nor myself were to be paid until the money was received.

(Objected to.)

Q. After the last conversation to which you have alluded to as having taken place at the Fifth Avenue Hotel, when both parties were present, under what agreement or arrangement did you regard yourself as employed to represent M'r Lamar: under the arrangement of which you have spoken as having been made with M'r Herbert, or under the arrangement then made with M'r Lamar?

(Objected to; taken subject.)

57 A. No arrangement was made at that time other than what I have stated. An employment had been arranged by M'r Lamar in person at a prior conversation at this hotel, and I held myself under that arrangement in a continued employment.

(Objected to.)

Q. Was that arrangement with M'r Lamar independent and outside of your arrangement with M'r Herbert?

(Objected to; taken subject.)

A. I could better answer that question by stating exactly what that arrangement was, but if I give the purport of the arrangement as it lies in my mind, I should say it was in addition to it, being for a quantum meruit for whatever services I might perform in that case.

Q. Have you, or have you not, been paid for your services in that case?

(Objected to; taken subject.)

A. I have been paid, and a bill given to M'r Lamar, receipted, which sets forth exactly for what.

Q. Have you made any claim, or have you any claim, against M'r Herbert, the plaintiff in this case, for the sum of $10,000, or for any other sum arising out of his contract with you, of which you have spoken?

58 (Objected to; taken subject.)

A. Certainly not; unless he should get his money. If his contract entitles him for his services in this case to $20,000, he certainly agreed to share it with me.

BENJ. F. BUTLER.

Answered, subscribed, and sworn to this 24th day of July, A. D. 1874.
JOHN A. WRIGHT,
*Notary Public, N. Y.*

*Defendant's Exhibit No.* 1.

Jasper K. Herbert. Harry Wilber, j'r.

LAW OFFICES OF HERBERT & WILBER,
58 *Broadway, New York, April 9th*, 1874.

MY DEAR GEN.: I am glad to see that Lamar's appeal is dismissed. He agreed with me to pay $20,000 to have it dismissed; this with me. I immediately went to Washington and employed you. When you asked me, "What about fees?" I replied, "You can have $5,000, or $10,000 if you like. I have an agreement with Lamar." You said, "All right; on that assurance I will go to work;" and we started off for the Attorney-General's Office.

59 Subsequently you told Lamar that "I (you) must command the ship, or you would not sail," or words to that effect.

Since that time I have left the matter with you.

Now, I want to have you understand in relation to this matter, as I stated to you before leaving Washington, that Lamar's agreement is for $20,000 to have the appeal dismissed. I want you to collect the money and send me a check for any portion to which you may think me entitled.

I advised Lamar, when in Boston, to employ you and me in this case. The employment did not come until others had failed, which made it more difficult.

Nevertheless, the agreement between L. and myself, before I would call on you in regard to it, was as I have stated.

Lamar is in Washington, and I leave the balance to you.

Yours, truly,

J. K. HERBERT.

Hon. B. F. BUTLER,
*Washington, D. C.*

*Defendants' Exhibit No.* 2.

HOUSE OF REPRESENTATIVES,
*Washington, D. C., April 12th*, 1874.

60 SIR: I have no power or authority to collect money in the case of M'r Lamar, nor can I collect your fees.

Very truly, yours,

BENJ. F. BUTLER.

J. K. HERBERT,
58 *Broadway, New York.*

*Defendants' Exhibit* No. 3.

Supreme court.

JASPER K. HERBERT, PLAINTIFF, *against* GAZAWAY B. LAMAR, DEFENDANT. } Summons for a money demand on contract.

To the defendant:

You are hereby summoned and required to answer the complaint in

this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, 58 Broadway, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of twenty thousand $\frac{00}{100}$ dollars, with interest from the 20th day of April, one thousand eight hundred and seventy-four, besides the costs of this action.

61 Dated April 20th, 1874.

HARRY WILBER, J'R,
*Plaintiffs' Attorney, 58 Broadway, New York City.*

*Defendant's Exhibit No. 4.*

New York supreme court.

KINGS COUNTY:

JASPER K. HERBERT, PLAINTIFF,
*against*
GAZAWAY B. LAMAR, DEFENDANT. } Amended complaint.

The amended complaint of the plaintiff respectfully shows to this court:

I. That he is an attorney and counsellor at law, duly qualified to practice his said profession in the courts of this State and in the Supreme Court of the United States of America.

II. That the plaintiff is a resident of the county of Kings, and that the defendant is a resident of the city of Savannah, in the State of Georgia.

III. That during the month of October, 1873, the defendant retained and employed the plaintiff to render professional services in and about a certain action then pending on appeal to the Supreme Court

62 of the United States, from a judgment of the Court of Claims, in favor of this defendant and against the United States, for the sum of five hundred and seventy-nine thousand dollars and upwards.

IV. That said services were reasonably worth the sum of twenty thousand dollars, and that the defendant promised and agreed to pay the sum of twenty thousand dollars if plaintiff should succeed in procuring the dismissal of said appeal, said sum to cover fees and disbursements of the plaintiff, and any assistance he might employ.

V. That plaintiff has duly performed said services and procured the dismissal of said appeal, and the payment to the defendant of the money due on said judgment, by the United States.

VI. That plaintiff has demanded payment from the defendant of the said sum of twenty thousand dollars; that payment thereof has been refused, and that the said sum is now due and owing from the defendant to the plaintiff.

Wherefore plaintiff demands judgment against the defendant

63 for the sum of twenty thousand dollars, with interest from the 20th day of April, 1874, together with costs and disbursements herein.

HARRY WILBER, J'r,
*Pl'ff's Attorney, 58 Broadway, New York City.*

64 (Indorsed:) United States circuit court, eastern district of N. Y. Jasper K. Herbert vs. Benjamin F. Butler. Case and excep-

tions. Harry Wilber, j'r, p'tf'ff's att'y, No. 58 Broadway, New York City. Agreed to. Develin & Miller, def't's att'ys.

65 U. S. circuit court, eastern district of New York.

JASPER K. HERBERT, PLAINTIFF IN ERROR,
vs.
BENJAMIN F. BUTLER.

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, do hereby certify that the foregoing is a true copy of the record and all proceedings in the above-entitled cause, numbered from page 1 to page 64, inclusive.

In witness whereof I have hereunto affixed my hand and the seal of said court at the city of Brooklyn, on this 11th day of October, A. D. 1875.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

(Indorsement on cover:) No. 223. Jasper K. Herbert, plaintiff in error, vs. Benjamin F. Butler. E. New York, C. C. U. S. Filed 15th October, 1875.

Settled as within
pursuant to the
rules of court.
Sept. 10 1875
B. Lincoln Benedict

# U. S. Supreme Court.

**No. 223.**

JASPER K. HERBERT,
*Plaintiff in Error,*

*vs.*

BENJAMIN F. BUTLER,
*Defendant in Error.*

Error to the United States Circuit Court for the Eastern District of New York.

ASSOCIATION

## Brief of Facts and Points of Law for Plaintiff in Error.

J. K. HERBERT,
*In Person.*,
35 Broadway, New York City.

New York:
Evening Post Steam Presses, 208 Broadway, cor. Fulton Street.
1878.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

U. S.

# U. S. Supreme Court.

JASPER K. HERBERT,
Plaintiff in Error.

*vs.*

BENJAMIN F. BUTLER,
Defendant in Error.

No. 223.

*Error to the United States Circuit Court for the Eastern District of New York.*

## Brief of Facts and Points of Law for Plaintiff in Error.

### Statement of the Case.

The declaration is for money had and received.

Plea—General Issue.

The following facts are not disputed:

I. That the late Gazaway B. Lamar, in October, 1873, employed the plaintiff to procure the dismissal of an appeal taken from the Court of Claims to this court, by the United States, from a judgment of that

court in favor of Lamar and against the United States, for upwards of $579,000.

Record, folios 22 and 27.

II. That Lamar promised and agreed to pay plaintiff $20,000 for such professional service.

Folious 22, 28, and 49.

III. That plaintiff employed defendant to assist him therein, agreeing to divide said fee with him.

Folios 22, 27, 28, 49, 57, and 58.

IV. That said appeal was dismissed and the judgment paid to Lamar, as the result of efforts of plaintiff and defendant.

Folios 25, 30, 31, and 46.

V. That the defendant received from Lamar, after exhibiting to said Lamar plaintiff's authority so to do, $25,000 for these services and others.

Folios 25, 26, 32, 36, and 37.

But the question in dispute is—

VI. Did Lamar pay, and did the defendant receive, $10,000 of that sum to the use of plaintiff?

This question, it is submitted, should have been given to the jury on the following evidence:

1st. The admitted employment of the defendant by plaintiff (folios 27, 28 and 49), which continued to the end of the transaction, any arrangement between defendant and Lamar being "in addition to" the employment by plaintiff. Folio 57.

2d. The admitted agreement that plaintiff was to receive $20,000 from Lamar and give defendant "half" for his assistance. Folio 49.

3d. The admitted presentation by defendant of plaintiff's order on Lamar for payment.
Folios 31, 32; Deft's Ex. No. 1, folios 58 and 59.

At folio 31 defendant swears "I showed him (Lamar) Herbert's letter, Ex. No. 1, but am not certain that I showed him my reply, Ex. No. 2."

*Non constat*, therefore, Lamar paid the money to defendant on plaintiff's order. Exhibit No. 1.

4th. That plaintiff swears he went to the defendant and told him he had called on Lamar for his fee, and was told by Lamar that he had paid it to defendant; that he repeated the conversation had on the subject with Lamar to defendant, including Lamar's statement that he had told defendant he had "agreed to give Herbert $20,000, and was ready to do it;" that the defendant replied to Lamar, "put $5,000 to it for the Boston case and I am content;" that Lamar had "agreed to defendant's proposition and paid the money;" and that defendant thereupon admitted to plaintiff that he had had such a conversation with Lamar.
Folio 25.

5th. That defendant denies that he had any such conversation with plaintiff, but nowhere denies that he had the alleged conversation with Lamar, and received the money as a result of it.
Folios 31, 32 and 33.

On the fourth and fifth propositions a square and somewhat material question of fact is raised between the plaintiff and defendant. As plaintiff states it, it is

a substantial admission that defendant received the $20,000 pursuant to Lamar's agreement with plaintiff. The defendant swears no such conversation ever took place between him and plaintiff, but entirely fails to swear that he did not settle with Lamar as therein stated, or that he did not, in fact, have such conversation with Lamar.

To the refusal of the Judge to give the case thus made to the jury, the plaintiff duly excepted at the time; and that is the error complained of here.

## Points of Law.

I.—Questions of fact are always for the jury.

This proposition is axiomatic and elementary, and does not need to be argued or supported by citations of authority here.

The evidence, as stated, and it is intended to be recited fairly, raises a question of fact which should have been given to the jury.

Indeed the defendant, in effect, admits this upon the record (folio 27, p. 7). After plaintiff rested,

"Defendant *waived an opening*, and, *to maintain his* "*defense*, Benjamin F. Butler was called as a witness "on his own behalf, sworn, examined by John E. "Devlin, Esq., his counsel, *and testified as follows:*"

If there were not sufficient evidence produced on the part of plaintiff to take his case to the jury, why was not a motion made then that the court direct a verdict?

Can any inference be drawn from the conduct of the defendant and his counsel, other than that they thought plaintiff had made a case?

And, by what law, except that of *Might*, could the issue thus tendered by the defendant be taken from the jury?

II.—It is conceded that the defendant was employed by the plaintiff, and contined in his employ to the end of the transaction (folio 57). Defendant was therefore, throughout, plaintiff's agent, and could make no contract about this matter of his agency, nor receive the money, otherwise than to the use of plaintiff, even under a new contract with Lamar, in relation to the subject matter about which plaintiff had employed him. But he got $25,000 in and about said employment, and he admits that he knew plaintiff's contract was for $20,000, and that plaintiff agreed to give him "half."

Upon the undisputed facts therefor, the plaintiff should recover.

Howe *vs.* Savory, 51 N. Y., 631.
Dutton *vs.* Willner, 52 N. Y., 312.
Baine *vs.* Brown, 56 N. Y., 285.
Bruce *vs.* Davenport, 36 Barb., 349.
Marvin *vs.* Buchanan, 62 Barb., 468.
Story on Agency, 6 Ed. Sec., 217.

III.—Since the printing of the record in this case, it has been suggested that it is defective in the want of a formal bill of exceptions, such as has been heretofore required in this court, and therefore that the judgment must be affirmed.

Whilst we do not apprehend that any such proposition can be seriously contemplated, in view of the law as it now stands, still it may be prudent to state our view of the subject here.

To such proposition, if presented, we answer:

(*a.*) The act of Congress of June 1st, 1872, sec. 5: Revised Stat. U. S., sec. 914, provides that:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity

and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, *any rule of court to the contrary notwithstanding.*"

(*b.*) The N. Y. Code, in force when this cause was tried, provides that "If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled as provided by the *rules of the court*, and then stated in writing in a case, or separately with so much of the evidence as may be material to the questions to be raised, *but need not be sealed or signed, nor need a bill of exceptions be made.*"

Voorhies' N. Y. Code, sec. 264.

(*c.*) The "rules of court" in force when this cause was tried below were those adopted by the convention of justices and judges at Albany, December 20 and 21, 1870.

Rule 41 of that revision provides that

"Whenever it shall be intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge) or *to review by appeal or otherwise a trial by a jury*, by the court, or by referees, a case or exceptions, or case containing exceptions, as may be proper and the party may elect, shall be prepared by the party intending to make the motion, or to review the trial," &c.

Appendix to Voorhies, N. Y. Code, 10th Ed., p. 19.

The rule further provides the method of settling such case or exceptions, or case con-

taining exceptions, when amendments are proposed, &c.; but in the case at bar a case containing exceptions was *settled by agreement* and *signed by the judge.*

Folio 64, p. 20.

It is believed that the only case in which this provision of the New York Code of Procedure, now called the "Old Code," was under review in the Court of Appeals was Zabriskie *vs.* Smith, I. Kernon, pp. 481–2, where the court say:

(*d*). "The provisions of this section [264] absolutely dispense with signing and sealing exceptions, and as plainly declare that *a bill of exceptions need not be made.*"

"Under the former practice, if a paper containing exceptions, and the evidence and rulings of the court upon which the exceptions were founded, was upon trial signed and sealed by the judge below it was *always regarded in the appellate courts as a bill of exceptions, although it lacked the formal commencement and conclusion technically appropriate to a bill of exceptions.*"

Thus, according to the Code of Procedure of New York, the "Rules of Court" when and where this case was tried, and the adjudication of the Court of last resort in that State, the "case containing exceptions," contained in the record here, would be sufficient on an appeal to the Court of Appeals, and we respectfully submit that it must be held sufficient by this Court.

No doubt can be cast upon it by the parties, for it is settled, and signed by the Judge who tried the cause, by agreement or consent.

Folio 64, p. 20.

And, indeed, it contains a true and faithful history of what transpired at the trial, though, of course, somewhat abridged (a circumstance supposed to be favored here), and advises this Court, with absolute precision, of the error complained of, and the ground of the complaint.

But the case is not left to stand or fall upon the sufficiency of the preceding. Section 954 Rev. Stat. U.S., is in part as follows:

> "No summons, writ, delaration, return, pro-
> "cess, judgment, or other proceedings in civil
> "causes, *in any Court of the United States*, shall
> "be abated, arrested, quashed, or reversed *for*
> "*any defect or want of form, but such Court shall*
> "*proceed and give judgment according as the*
> "*rights of the cause and matter in law shall ap-*
> "*pear to it, without regarding any such defect,*
> "*or want of form*, except those which, in cases
> "of demurrer, the party demurring specially
> "sets down, together with his demurrer as the
> "cause thereof; and such Court *shall* amend
> "every such defect, and want of form, other
> "than those which the party demurring so ex-
> "presses; *and may at any time* permit either of
> "the parties to amend any defect in process or
> "pleadings, upon such conditions as it shall, in
> "its discretion, and by its rules prescribe."

The numerous and familiar cases construing and applying this section need not be cited; they are familiar to the Court.

It is submitted, with the utmost confidence, that whatever the record in this case may lack in *form*, nevertheless, it contains enough in *substance*, to be saved by the benignity of this provision of law.

The error complained of was excepted to at the trial. The record shows that fact, and the evidence upon which the exception was based. Both come to this

Court in terms to which the parties have agreed, and which were by the Judge settled and signed accordingly.

The only words necessary, if any are, to satisfy the most rigid rule, are but the few *formal* ones required to technically change a "case" into a "bill of exceptions."

If, after line 2, page 20 of the record, there had been added the following words:

"And because none of these matters appear of "record, Honorable Charles L. Benedict, one of the "Judges of said court, has settled and signed this bill "of exceptions this 1st day of June, 1875.

"CHARLES L. BENEDICT."

There would hardly be room to question but that the "case" was fully "turned into a bill of exceptions."

Instead, however, we have here *the same "case and exceptions"* which would thus have been made part of the record by a bill of exceptions, with the following words in lieu thereof:

"Agreed to.

"DEVLIN & MILLER,
"Attys. for Deft.

"Settled as within, pursuant to the above consent.
"Sept. 19, 1875.

"CHAS. L. BENEDICT."

Would it not, therefore, be standing on "*defect or want of form*" to hold that there is nothing here to review?

It cannot be that justice will, at this day, and under the statute quoted, turn a suitor out of this Court for such a ceremonial defect.

## IV.

The judgment should be reversed, and a new trial ordered, with costs and disbursements.

J. K. HERBERT,
in person.

IN THE

# Supreme Court of the United States.

**October Term, 1877.**

JASPER K. HERBERT,
PLAINTIFF IN ERROR,
*vs.*
BENJAMIN F. BUTLER.

*No.* 223.

**Brief of Counsel of Defendant in Error.**

The plaintiff in error commenced his action originally in the supreme court of the State of New York, county of Kings, on or about the 21st October, 1874, (Rec., p. 3, foot,) in which he claimed ten thousand dollars had and received, as he alleged, by defendant in Washington, D. C., on or about the 15th April, 1874, from G. B. Lamar for the use of plaintiff, and which the defendant then promised to pay to plaintiff when demanded.

Rec., p. 4, fol. 15.

The supreme court of New York ordered the case to be removed to the circuit court of the United States for the eastern district of New York, and on the 6th January, 1875, the defendant appeared in said circuit court and filed a certified copy of the summons, complaint, and order of

the supreme court of New York, when it was ordered that the cause proceed in the said United States circuit court as if commenced by original process therein.

Rec., p. 3, fols. 9 to 12.
U. S. Rev. Stat., sec. 639.

On the 5th March, 1875, the defendant filed plea that he did not undertake and promise in manner and form, etc., and put himself upon the country.

Rec., p. 4, fols. 16 to 18.

The cause, after a full hearing, was committed to the jury on 1st June, 1875, and, under direction of the court, verdict rendered for defendant, with costs.

Rec., p. 4 foot, p. 5 top.
Rec., p. 10, top.

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The first question presented here is whether this court can take jurisdiction, or look into the case?

On opening the record the court will find nothing to act upon.

There is no error apparent on the face of the record.

Minor *vs.* Tillottson, 1 Howard, 289.

There is no statement of facts, either in form (Burr *vs.* Des Moines River and Navigation Company, 1 Wallace, 99) or in effect, which this court can look into. The cause was tried by a jury, and of course the facts cannot be re-examined.

Const., Amdt. VII.

There is no bill of exceptions.

Thompson *vs.* Riggs, 5 Wallace, page 675.
The Phœnix Insurance Company of Brooklyn *vs.* Lanier. Not reported, decided at this term.

There are notes of exceptions by plaintiff. They do not appear from the minutes of the judge, but from what is called "case and exceptions agreed on by the attorneys" of the parties.

Rec., p. 5, top, after the verdict and judgment.

The first exception noted is on Rec., p. 6, fol. 26; the second on Rec., p. 8, fol. 33; the third on page 9, fol. 34; the fourth on page 9, fol. 35. These are to rulings on evidence. The fifth is on page 10, top; this is to the direction of the court to the jury. None of these can be noticed as "a bill of exceptions" by this court.

Pomeroy's Lessee *vs.* Bank of Indiana, 1 Wall., 602.
Young *vs.* Martin, 8 Wallace, 354.

It is plain from what precedes that the plaintiff in error has brought nothing here for the court to review, and the judgment below must be affirmed.

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If this court can re-examine the cause, what is presented? The plaintiff on oath stated his case to the jury; the defendant likewise stated his; the jury found for the latter. The case was too plain for argument in the court below, and presents the same aspect here.

We respectfully pray your Honors to dismiss or affirm.

DURANT & HORNOR,
*for Defendant in Error.*

WASHINGTON, *January* 31, 1878.